Supreme Court, U.S.
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No. 91-1492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID LEE PHILLIPS,

Petitioner,

v.

STATE BAR OF NEVADA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SHELDON A. BRESKOW, ESQ.
State Bar of Nevada
201 Las Vegas Boulevard South
Suite 200
Las Vegas, Nevada 89101

Attorney for Respondent
State Bar of Nevada

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The Respondent respectfully moves the Court to deny the Petition for Certiorari, in the alternative, to affirm the judgment of the Supreme Court of Nevada on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

The Respondent will respond below in its Argument to each of the two (2) questions presented by Petitioner.

OPINIONS BELOW

The order giving rise to Petitioner's Petition for Certiorari was made and entered by the Supreme Court of Nevada suspending Petitioner from the State Bar of Nevada for six (6) months and one (1) day. ***In re: Discipline of David Lee Phillips (Dec. 6, 1991) not yet reported.*** (Appendix A-1 to A-3, to Petition for Writ of Certiorari).

JURISDICTION

Petitioner has failed to raise any substantial federal questions by his petition and, therefore, has failed to invoke the jurisdiction of the Supreme Court of the United States. Additionally, Petitioner has failed to demonstrate by the record or by argument any right to review.

STATUTES INVOLVED

Petitioner has fairly summarized those provisions of the various constitutional provisions, statutes and court rules that he claims have application to the questions presented.

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" appears on pp. 2-8, inclusive, of his Petition for Writ of Certiorari. A substantial portion of Petitioner's Statement is immaterial and irrelevant to the proceeding which is the subject of this matter. For example, Petitioner attempts to relitigate the order of suspension entered by the Hearing Panel and the Supreme Court of Nevada on December 6, 1991. The record shows that the Petitioner was suspended by order of the Supreme Court of Nevada.

A more concise and accurate statement of the case appears in the argument portion of this brief.

ARGUMENT

Petitioner makes two constitutional claims, neither of which is substantial. The first is that Nevada Supreme Court Rule 165 is vague and over-broad. The rule is set out in its entirety at page three (3) of the Petition for Writ of Certiorari.

The Petitioner also claims a constitutional violation in the application of the rule by his second constitutional challenge that he was denied due process of law because the Bar Complaint alleged that he had received a **retainer fee,** but that the proof was that he had received Twenty-One Thousand dollars and no/100 ($21,000.00) to hold in trust for a prospective client. It is axiomatic that pleadings conform to the proof at trial of a noncriminal matter. The fact that funds received by petitioner were labeled retainer fees in the Bar Complaint, but the proof was they were intended to be held by Petitioner in a fiduciary capacity, can hardly rise to the level of a substantial federal due process claim.

The distinction between retainer fees and fiduciary funds required to be safely kept by the ethical rules of the Bar is arguably misplaced by the Petitioner. Unearned retainer fees are required to be held by an attorney under the ethical opinions of the Bar.

Petitioner acknowledges that the Nevada Supreme Court Rule which he challenges is identical to the American Bar Association's **Model Rules of Professional Conduct** Rule 1.15 dealing with safekeeping of property. See also the (1970) ABA Model Code of Professional Responsibility DR 9-102 which was the forerunner to the challenged rule, and is substantially the same as ABA Model Rule 1.15. So that the rule in Nevada which Petitioner challenges has been the Organized Bar's ethical rule for safekeeping of property for over 22 years. Even a casual reading of the rule makes it

clear that it is neither over-broad nor vague and this, together with the Nevada Supreme Court finding foreclosed the issue that "(S)pecifically, we conclude that Phillips was not denied fair notice of the charge against him because the complaint referred to the Carson funds as being retainer fees." (Appendix to Petition for Writ of Certiorari A-3)

CONCLUSION

Wherefore, Respondent respectfully submits that the questions upon which this cause depends are so unsubstantial as not to require further argument, and Respondent respectfully moves the Court to deny this Petition for Writ of Certiorari, or, in the alternative, that the judgment and order of the Supreme Court of Nevada dated December 6, 1991 should be affirmed.

Respectfully submitted,

/s/ *Sheldon A. Breskow*
SHELDON A. BRESKOW

Attorney for Respondent
State Bar of Nevada
201 Las Vegas Boulevard South
Suite 200
Las Vegas, Nevada 89101
Telephone: 702-382-2200